

Separation of Powers and Statutory Interpretation: A Battle Hidden in Plain Sight¹

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My ninth-grade civics teacher taught me that our government consists of three branches: legislative, executive, and judicial. You probably learned the same thing. Congress makes the laws, the president enforces the laws, and the courts adjudicate whether someone has broken those laws. This separation of powers, together with a government of limited authority and a Bill of Rights, protects our most fundamental liberties. James Madison, father of our Constitution, put it this way in *Federalist* 47: “[T]he legislative, executive, and judiciary departments ought to be separate and distinct. . . . No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty . . .”²

Today, hundreds of years removed from the fiery debates at the constitutional convention, our nation is still working out precisely how much power each branch has. But I’m not here to talk about executive orders declaring national emergencies or protecting the Dreamers, or even about congressional subpoenas to the executive branch. You already know about those controversies. Instead, I want to talk about an equally important battle brewing over the separation of powers, but one you may have missed because it’s being fought out on the often-dreary terrain of statutory interpretation. This issue produces no splashy headlines, yet it is one of fundamental constitutional importance. So my purpose today is to equip you to follow that debate as the battle rages on.

I’ll begin with a puzzle. And please bear with me; this might get a little technical, but it’s worth it. The Fair Labor Standards Act, a pillar of our post–New Deal labor economy, requires employers to pay overtime and imposes hefty fines if they don’t. But the Act exempts from that overtime requirement certain categories of workers, including

¹ Read 25 April 2019. The talk has been lightly edited and updated to reflect Supreme Court decisions issued thereafter.

² *Federalist*, no. 47 (James Madison).

“any salesman, partsman, or mechanic primarily engaged in selling or *servicing* automobiles.”³ Many car dealers employ workers called “service advisors” who interact with customers, listen to their concerns, and then suggest particular repairs to be performed by mechanics. So the question is this: Are employees who sell repair *services*, but who don’t do the repairs themselves, “servicing automobiles”? You could argue for a narrow interpretation: that “servicing” means “performing repairs” only, so service advisors would fall outside the exemption and be entitled to overtime. Or you could argue for a broader interpretation: that the process of “servicing” automobiles includes everything from the very first customer interaction to the last, meaning that service advisors would fall within the exemption and get no overtime.

I think it’s fair to say that this provision is ambiguous. Either interpretation would be reasonable. So who gets to pick? Perhaps the most obvious candidate is Congress, the author of the statute and the source of the ambiguity. But legislating is slow, and laws are hard to amend for even a functional Congress. And auto dealers and service advisors need answers now.

This talk is about which of the other two branches gets to interpret Congress’s ambiguous statutes. I bet most of you would guess it’s the judiciary. After all, the job of judges is to interpret the law, right? Well, not quite. As the law stands now, under a doctrine named after a Supreme Court case called *Chevron*—I’ll have a lot more to say about that in a few minutes—executive agencies, in this case the Department of Labor, and not the courts, have the power to interpret vague or incomplete statutes. Now that might sound like a mundane technicality, but it’s actually enormously important. And here’s why.

The executive branch consists of hundreds of agencies, from cabinet-level departments that you’ve certainly heard of, like the Department of Labor, to tiny agencies that you almost certainly have not, like the American Battle Monuments Commission (see Figure 1). Many of those agencies are authorized by Congress to issue regulations that flesh out the statutes they administer, and the choice they make between two reasonable interpretations of a statute is just that: a choice. It *makes* policy. And what’s more, it creates winners and losers. Either the service advisors or the car dealers will have less money. You see, then, our high school civics teachers weren’t exactly right when they told us that lawmaking is Congress’s exclusive domain. Under *Chevron*, executive agencies, too, can make law by regulation when Congress has failed to make law by unambiguous statute. And that authority

3 29 U.S.C. § 213(b)(10)(A) (emphasis added). The Supreme Court has issued two opinions concerning the meaning of this phrase. See *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018); *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117 (2016).



FIGURE 1. Federal agencies.

implicates core constitutional principles regarding the separation of powers, individual liberties, and democratic accountability. So those are the stakes.

But before launching into *Chevron*, I need to make a disclosure. Because my court hears so many *Chevron* cases, my comments today are constrained by the rules of judicial ethics. Although the Code of Conduct for United States Judges permits—even encourages—judges to “write, lecture, and teach” about the law, I can’t do anything that might, as the Code puts it, “reflect adversely on [my] impartiality.”⁴ So today I hope to demonstrate how a sitting judge can talk about an important and evolving constitutional debate without transgressing that boundary. I will tell you where *Chevron* has been and where it may be going, but I won’t tell you anything that you couldn’t discover on your own by reading a treatise on administrative law—which, I am sure, you are eager to do.

The Supreme Court decided *Chevron v. Natural Resources Defense Council* in 1984. At issue in the case was a provision of the Clean Air Act that imposes limits on “new or modified major stationary sources” of air pollutants.⁵ President Carter’s Environmental Protection Agency (EPA) had interpreted “source” to mean either a whole industrial plant or “an identifiable piece of equipment [within] a plant.”⁶ But President

4 Code of Conduct for United States Judges, Canon 4.

5 42 U.S.C. § 7502(c)(5).

6 *Natural Resources Defense Council, Inc. v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982).

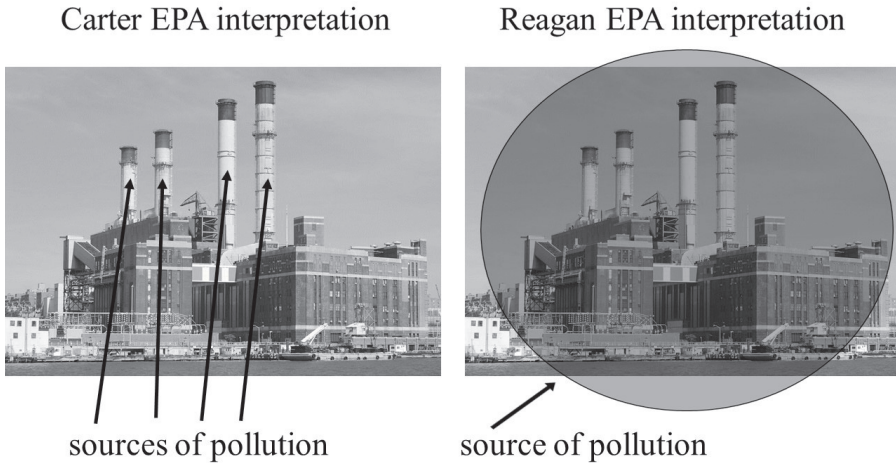


FIGURE 2. Two different interpretations of “source.”

Reagan’s EPA reversed course and adopted a “plantwide definition” of the word “source,” measuring emissions as if the whole plant were enclosed inside a single, pollution-emitting bubble (see Figure 2).⁷ That interpretation had significant consequences for pollution control because it allowed plants, instead of reducing emissions, to offset pollution increases in one part of the bubble with decreases in another. Environmental groups sued, arguing that the EPA’s “bubble concept” misinterpreted the word “source” and weakened the Clean Air Act’s protections.

The Supreme Court ruled for the EPA, but not because it thought the bubble concept was necessarily the *best* reading of the statute. Instead, the Court ruled that the word “source” is ambiguous and that when Congress uses ambiguous language, it is implicitly delegating authority to the agency to interpret the statute. The Court explained: “While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for [that] political branch . . . to make . . . policy choices . . . resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency [F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do.”⁸

And for over three decades now, courts have been operating under that rule. Indeed, *Chevron* has become encoded into our judicial DNA:

⁷ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 840 (1984).

⁸ *Id.* at 865–66.

courts have cited *Chevron* over twice as many times as *Brown v. Board of Education* and *Roe v. Wade* combined. And it's no wonder, for there are, by my count, almost 450 agencies which collectively issue regulations at a pace of about 3,500 per year. And to all of these rules from all of these agencies, from the EPA to HHS to the FCC—the whole alphabet soup of federal agencies—we apply the “*Chevron* two-step.” At step one, we decide whether Congress has spoken clearly, for if it has, the agency has nothing to interpret. But if the statute is unclear, then we proceed to step two, where we ask whether the agency's interpretation is reasonable. If it is, then the court, regardless of its own views, must defer to that interpretation. We do this for laws even when we know for certain that the agency has extended the statute to a circumstance never anticipated by Congress. And we apply *Chevron* to statutory gaps big and small, from single words like “source” or “servicing” to capacious phrases like which Securities and Exchange Commission regulations are “necessary or appropriate in the public interest or for the protection of investors,”⁹ or what Occupational Safety and Health Administration rules are “reasonably necessary or appropriate to provide safe or healthful employment.”¹⁰ Altogether, then, *Chevron* has wrought a massive transfer of authority from the courts to the executive branch, with far-reaching consequences for the way our government regulates everything from our economy, to the environment, to public health and safety.

There's hardly a better example of the policymaking power lurking behind the curtain of statutory interpretation than the controversy over net neutrality. Applying *Chevron*, the Supreme Court has ruled that the critical language in the Telecommunications Act is ambiguous, meaning that it's up to the FCC to determine how to regulate broadband Internet access. As a result, the Obama FCC, on a 3–2 vote, classified the Internet as a highly regulated public utility. And now the Trump FCC, also on a 3–2 vote, has done just the opposite and deregulated it. Think about that. How we regulate the Internet—perhaps the most revolutionary communicative tool since the printing press—is decided not by Congress, not by the courts, but by five unelected members of the FCC. I wonder what James Madison and my ninth-grade civics teacher would think about that.

Indeed, *Chevron's* power has not gone unnoticed. In the past decade especially—due in part, no doubt, to the tremendous expansion of the administrative state—*Chevron* deference has been the subject of

9 E.g., 15 U.S.C. § 78l (registration requirements for securities); *id.* § 78n (proxies); *id.* § 80b-4 (reports by investment advisers).

10 29 U.S.C. § 652(8) (defining the term “occupational safety and health standard”); see also *id.* § 655(b) (authorizing promulgation of occupational safety or health standards).

growing criticism, beginning in the law schools and radiating out into the halls of Congress and the courts. According to *Chevron*'s critics, the doctrine has tipped the scales too far toward the agencies: by allowing the executive branch to both enforce and interpret law—a judicial function, the argument goes—*Chevron* erodes the constitutional separation of powers and threatens our individual liberties. Justice Thomas recently cautioned: “[W]e seem to be straying further and further from the Constitution without so much as pausing to ask why. We should stop to consider that document before blithely giving the force of law to any other agency ‘interpretations’ of federal statutes.”¹¹ Or, as then-Judge Gorsuch put it somewhat more forcefully: “[T]he fact is *Chevron* . . . permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers’ design. Maybe the time has come,” he warned, “to face the behemoth.”¹²

Now so far, the core of *Chevron* remains alive and well. But the process of chipping away has begun.

The most important crack in the *Chevron* foundation is something called the “major questions doctrine.” Recall that in *Chevron*, one of the Court’s justifications for deferring to agencies was its assumption that Congress makes statutes ambiguous for a reason: ambiguity implies delegation. The major questions doctrine holds that for some subset of especially important policy issues, Congress would not have been so subtle. For example, the Obama Administration’s first major effort to limit greenhouse gases would have imposed restrictions on “millions of previously unregulated” small sources—everything from stores to apartment buildings to schools and even to churches.¹³ That was too much for the Supreme Court. It refused to afford the EPA *Chevron* deference, explaining that “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.”¹⁴ Now those of us on the courts of appeals are left with the question: How major is too major? Ultimately it will be up to the Supreme Court to tell us.

A second sign of the Court’s growing skepticism has to do with a *Chevron* cousin, so to speak. In March 2019, the Supreme Court heard oral argument in *Kisor v. Wilkie*, a case challenging so-called *Auer* deference—*Chevron*-like deference that applies not when agencies

11 *Michigan v. EPA*, 135 S. Ct. 2699, 2714 (2015) (Thomas, J., concurring).

12 *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

13 *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 332 (2014).

14 *Id.* at 324 (internal quotation marks omitted).

interpret ambiguous statutes, but rather when they interpret their own ambiguous regulations.¹⁵ Had you attended the oral argument, you would have heard echoes of the *Chevron* debate. Justice Gorsuch was concerned that the plaintiff, a veteran seeking VA benefits, had, in the justice's words, been "sideswiped . . . by a bureaucracy" that announced a new interpretation of its regulation right "in the middle of" the veteran's case.¹⁶ "I'm not sure," Gorsuch said, "how that serves democratic processes or the separation of powers."¹⁷ But Justice Breyer had a different worry. "We know that . . . agencies aren't very democratic," he stated, "but there is . . . one group of people who are still less democratic, and they're called judges."¹⁸

In the end, *Auer* lived to fight another day, but it did not escape unscathed. In her opinion for the majority, Justice Kagan took "the opportunity to restate, and somewhat expand on . . . the limits of *Auer* deference."¹⁹ And Justice Gorsuch, lamenting that "[i]t should have been easy for the Court to say goodbye to *Auer*," nonetheless characterized the decision as "more a stay of execution than a pardon."²⁰ But perhaps the most interesting feature of the justices' opinions came in the form of a disclaimer: Chief Justice Roberts and Justice Kavanaugh each wrote separately to state, somewhat cryptically, that they did not "regard the Court's decision . . . to touch upon" questions regarding "judicial deference to agency interpretations of statutes enacted by Congress"—that is, *Chevron* deference.²¹ Despite this less-than-clear clarification, I suspect that in the Court's debate over whether to overturn *Auer*, we may be witnessing a dress rehearsal for a *Chevron* fight yet to come.

And finally, there's a third potential limit, though it's more of a revival than an original. Back in the 1930s, the Supreme Court, seeking to limit how much lawmaking authority Congress may give to the executive branch, developed what we now call the "non-delegation doctrine." The Court explained that because "[t]he Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States' . . . Congress is not permitted to abdicate or to transfer to others the essential legislative functions with

15 *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

16 Transcript of Oral Argument at 56, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

17 *Id.*

18 *Id.* at 48.

19 *Kisor v. Wilkie*, 139 S. Ct. at 2414.

20 *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

21 *Id.* at 2425 (Roberts, C. J., concurring in part); *id.* at 2449 (Kavanaugh, J., concurring in the judgment) (quoting Chief Justice Roberts).

which it is thus vested.”²² When the non-delegation doctrine first appeared on the scene, it had real bite; the Court used it to strike down two major New Deal statutes. But the doctrine has since morphed into a rule requiring that Congress articulate only some “intelligible principle” to govern agencies’ exercise of delegated authority—a very low bar indeed.²³

But we may yet witness a comeback. In October 2018, an eight-justice Supreme Court (Justice Kavanaugh had not yet been confirmed) heard oral argument in a case raising a non-delegation issue, *Gundy v. United States*.²⁴ Four justices signed on to an opinion reaffirming that the requirements of the non-delegation doctrine “are not demanding,”²⁵ while four other justices, in two different opinions, expressed their willingness—eagerness, even—to “reconsider”²⁶ the Court’s approach “[i]n a future case with a full panel.”²⁷ If in the future the Court does give the non-delegation doctrine some teeth, the effect would be a Court-brokered transfer of power from the agencies back to Congress. If legislation must give more specific instructions, then more decisions will be made in the halls of Congress and fewer in the offices of unelected agency officials.

And there ends my orientation. It’s unclear precisely where we will go from here, but now I hope you understand the far-reaching implications of whatever happens next. *Chevron* has shifted an enormous amount of authority from courts to agencies, and as courts ratchet *Chevron* back, so, too, do they claw some of this power to interpret—and thereby make—law. Without *Chevron*, we judges will decide what pollution limits are necessary to “protect the public health,”²⁸ and which securities regulations are “necessary . . . for the protection of investors,”²⁹ and how to regulate the Internet. And if you think the judicial confirmation process is politicized now, just wait until we

22 *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (quoting U.S. Const. art. I, § 1).

23 *Whitman v. American Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (internal quotation marks omitted).

24 *Gundy v. United States*, 139 S. Ct. 2116 (2019).

25 *Id.* at 2129.

26 *Id.* at 2131 (Alito, J., concurring in the judgment) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

27 *Id.* at 2148 (Gorsuch, J., dissenting) (“In a future case with a full panel, I remain hopeful that the Court may yet recognize that, while Congress can enlist considerable assistance from the executive branch in filling up details and finding facts, it may never hand off to the nation’s chief prosecutor the power to write his own criminal code.”).

28 42 U.S.C. § 7409(b)(1).

29 E.g., 15 U.S.C. §§ 78l, 78n, 80b-4.

judges get to make those sorts of decisions. But while this particular battlefield is different than in decades past, the landscape is all too familiar: Welcome to our nation's two-and-a-half century debate about how to keep our three branches of government "separate and distinct."³⁰

30 *Federalist*, no. 47 (James Madison), *supra* note 1.